"goods and wares and merchandise" within the statute of frauds,[6] may be seized in a replevin suit,[7] and may be made subject to levy and sale on execution.[8]

The present holding, however, while it attacks the alleged basis of numerous decisions, will probably not affect the result in such cases in the future. Thus in cases under the inheritance or succession tax laws, the transfer of notes can still be taxed, because what is really taxed is not the notes as property but the transfer.[9] Again in states where a non-resident is carrying on a business, perhaps merely that of loaning money, he can still be taxed on his credits, since the real basis of this tax is not the physical presence in the state of the evidences of the credits, but the transaction of business under the protection of the state laws. Accordingly, it has been held that business credits of a non-resident may be taxed, although the notes evidencing them are out of the state,[10] or although the only evidences are memorandum checks,[11] or even open book accounts,[12] or a bank deposit.[13] Nevertheless, the present decision is to be regretted, since it checks the tendency toward a uniform rule that all substantial evidences of debt are taxable where found. The court claimed to be influenced by the desire to avoid double taxation. But the more efficacious method would be to follow the analogy of tangible personalty, allow all notes, bonds, etc., to be taxed where held, and then to decide that the maxim *mobilia sequuntur personam* should apply only in the absence of an actual situs.

THE FIDUCIARY CHARACTER OF DIRECTORS. — It is universally acknowledged that directors stand in a fiduciary relation to the corporation, but the extent and effects of this relationship are in dispute. The very common statement that they are trustees is palpably inaccurate, since they do not hold the legal title to the corporate property.[1] Like a trustee, a director must use reasonable care[2] and act in the utmost good faith,[3] but he is not liable for errors in judgment,[2] nor for wrong-doing by a co-director not imputable to him in fact.[4] In common with other fiduciaries, he will be prevented from profiting directly or indirectly by an abuse of his position,[5] and will be compelled to surrender to the corporation any rebates or bribes[6] he may receive.[7] However, while most fiduciaries must surrender the benefit of any bargain they may make in connection with the *res*,[8] a director may

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6 Baldwin *v.* Williams, 3 Met. (Mass.) 365.
7 See Pritchard *v.* Norwood, 155 Mass. 539, 542.
8 Brown *v.* Anderson, 4 Mart. (N. S.) (La.) 416.
9 Blackstone *v.* Miller, 188 U. S. 189.
10 Metropolitan, etc., Co. *v.* New Orleans, 205 U. S. 395. See 20 HARV. L. REV. 656.
11 State Board *v.* Comptoir Nat. d'Escompte, 191 U. S. 388.
12 People *v.* Barker, 157 N. Y. 159.
13 New Orleans *v.* Stempel, *supra.*

1 Olney *v.* Land Co., 16 R. I. 597, 598.
2 Vance *v.* Phœnix Co., 4 Lea (Tenn.) 385; 15 HARV. L. REV. 479.
3 New Memphis Gaslight Co. Cases, 105 Tenn. 268, 289.
4 Movius *v.* Lee, 30 Fed. 298.
5 Wardell *v.* R. R., 103 U. S. 651.
6 Rutland Light Co. *v.* Bates, 68 Vt. 579. See Metropolitan Bank *v.* Heiron, 5 Ex. D. 319.
7 A director may break with impunity a contract to use his authority or influence illegitimately. Noel *v.* Drake, 28 Kan. 265.
8 Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 388.

purchase unmatured obligations of the corporation at a discount, and enforce them at par if the corporation has not a sinking fund for the same purpose.[9] That in another respect a director is subject to less limitations than most other fiduciaries,[10] is the effect reached by a recent New Jersey case in holding that he may buy corporate property at an execution sale on a judgment held by him. *Marr* v. *Marr*, 66 Atl. 182 (Ct. of Ch.). The weight of authority supports this result, and also his right to purchase when he forecloses a mortgage on the corporate property.[11] Furthermore, by the majority opinion, he may buy at a sale resulting from execution or foreclosure by another, or by order of trustees with power to sell.[12] But the corporation may have the sale set aside in any of these cases if the director has been guilty of any fraud or even of unconscionable conduct,[13] and the courts will demand a high degree of *bona fides*.[14]

Concerning the limitations imposed by the fiduciary relation upon the director's right to deal with the corporation, there seems to be the greatest uncertainty. Occasionally the argument is raised against these transactions that after all the directors are dealing with themselves, so that there is an identity of parties.[15] This is legally fallacious, since one party is the artificial legal entity, the corporation. We must distinguish the case where a director is an agent appointed to achieve some end. In doing so he cannot deal with himself, on elementary principles of agency,[16] aside from the fact that he is a director, or that his principal is a corporation. When one or more directors contract with the corporation, a minority of the courts hold the contract voidable[17] at the election of the corporation on the ground of policy:[18] they would remove entirely the temptations attendant upon interests antagonistic to the corporation. There is a little authority declaring such a contract void.[19] But a majority of the courts hold such a contract good when there was a majority voting for it exclusive of the interested directors, and when, after a most careful scrutiny, they can find no trace of bad faith, unfairness, or concealment.[20] This would seem to be the better view, for it sufficiently protects the corporation and yet leaves open to both it and the directors the opportunity for a mutually beneficial contract. With but little dissent a mortgage given by a disinterested majority to a director for money advanced is held good when the transaction is *bona fide*, and the director is permitted to foreclose.[21] Also, a director may sue for a quasi-contractual obligation incurred by the corporation in his favor, and upon

[9] St. Louis, etc., R. R. *v.* Chenault, 36 Kan. 51; Glenwood *v.* Syme, 109 Wis. 355.

[10] Marshall *v.* Carson, 38 N. J. Eq. 250.

[11] Lucas *v.* Friant, 111 Mich. 426; New Memphis Gaslight Co. Cases, *supra*. *Contra*, *Re* Iron Clay Co., 19 Ont. 113.

[12] Janney *v.* Minneapolis Exposition, 79 Minn. 488; Harts *v.* Brown, 77 Ill. 226. But see Hoyle *v.* Plattsburg, etc., R. R., 54 N. Y. 314, 329.

[13] Hallam *v.* Indianola Co., 56 Ia. 178.

[14] There is a conflict as to whether a director owes any fiduciary obligations to the stockholders. See Stewart *v.* Harris, 69 Kan. 498; 17 HARV. L. REV. 58. When the corporation becomes insolvent, the directors are fiduciaries for the creditors. Olney *v.* Land Co., *supra*.

[15] See Haywood *v.* Lincoln Co., 64 Wis. 639, 647.

[16] Story, Agency, 9 ed., § 211.

[17] The corporation may ratify by act or conduct. Kelley *v.* Newburyport R. R., 141 Mass. 496.

[18] Munson *v.* Syracuse, etc, R. R., 103 N. Y. 58; Aberdeen Ry. *v.* Blakie, 1 Macq. 461.

[19] Miner *v.* Ice Co., 93 Mich. 97.

[20] 1 Mor., Priv. Corp., § 527; 3 Clark & Marshall, Priv. Corp., § 761 *c*.

[21] Mullanphy Bank *v.* Schott, 135 Ill. 655; Garrett *v.* Burlington Co., 70 Ia. 697.

obtaining judgment may levy execution.[22] The majority of courts are therefore but logical in granting him the right of further protecting himself by buying in at the foreclosure or execution sale. The common statement that a director cannot create relations antagonistic to the interests of the corporation, would seem too broad a generalization.

ESTOPPEL OF A CESTUI QUE TRUST BY THE TRUSTEE'S MISREPRESENTATION. — That an equitable mortgagee of realty is not always safe in relying on the apparent regularity of title-deeds, is shown by a recent English case. *Capell* v. *Winter*, [1907] 2 Ch. 376. A trustee with power of sale gave a deed of trust property containing a recital of full payment of the purchase price, as security for a personal debt. The creditor, with notice of the trust, deposited the deed by way of equitable mortgage with the defendant, who had no notice of the trust or of non-payment. The court decided that the equities of the beneficiaries of the trust and of the equitable mortgagee were equal in other respects and that the equity of the beneficiaries, being prior in time, prevailed. It is clear that if a trustee retains the legal title, he cannot by a breach of trust create an equity in a third person superior to that of the *cestui que trust*.[1] For there the claim of the *cestui* is directly against the fraudulent trustee and, having been guilty of no misconduct himself, he can assert his beneficial ownership. But if a *cestui que trust* or other equitable claimant, by word or conduct, causes the belief that the trustee is the sole beneficial owner, he will be deferred to a subsequent equitable encumbrancer who has acted on the faith of such misrepresentation.[2]

It has been held that where a vendor delivers a deed containing a false receipt for the purchase money,[3] an equitable mortgagee who makes advances relying on the misstatement has a claim superior to the vendor's lien.[4] The law of agency supplies an analogous principle.[5] And where the vendor was a trustee with power of sale the equitable mortgagee was likewise protected,[6] on the ground that a claim on a third party — the vendee — superior to that of the trustee is also superior to that of the *cestui*, who must establish his rights through the trustee. The present case seems indistinguishable on principle: in both a trustee executed a conveyance with a fraudulent receipt of the purchase money; in both a third party was induced by this false statement of fact to advance money to the grantee. The court here declares the principles of the former decisions to be confined to cases of vendors' liens, and so inapplicable where a *prima facie* sale is made to conceal a mortgage, and expressly denies that the true basis is estoppel. There seems, however, little difference in saying that the equitable mortgagee is protected because he relied on a misrepresentation of fact, as stated in the earlier cases, and that the *cestui* is estopped from asserting a claim

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[22] Deane *v.* Hodge, 35 Minn. 146; Rollins *v.* Shaver Co., 80 Ia. 380.

[1] Shropshire Ry. Co. *v.* The Queen, L. R. 7 H. L. 496 (an equitable mortgage of stock).

[2] Rice *v.* Rice, 2 Drew. 73.

[3] This is by statute sufficient evidence of payment in favor of a subsequent purchaser. 44 & 45 VICT., c. 41, §§ 54, 55.

[4] Bickerton *v.* Walker, 31 Ch. D. 151. See *In re* Castell, [1898] 1 Ch. 315.

[5] Brockelsby *v.* Building Society, [1895] A. C. 173.

[6] Lloyds Bank, Ltd. *v.* Bullock, [1896] 2 Ch. 192.